

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
STATE OF MONTANA
Request for Waiver of Section 90.20(g)(3)(ii) of
the Commission's Rules
File Nos. 0003330577, 0003330578

ORDER

Adopted: August 30 , 2010

Released: August 30 , 2010

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The State of Montana (Montana) filed two applications for authority to use two VHF Public Coast (VPC) channels as part of its statewide communication system. In conjunction with these applications, Montana seeks waiver of Section 90.20(g)(3)(ii) of the Commission's rules, in order to operate mobile units in excess of the power limits and base stations in excess of the power and antenna height limits. For the reasons discussed below, we grant Montana's request as conditioned herein.

II. BACKGROUND

2. Montana seeks to construct a private land mobile radio system, which will operate as part of a statewide communication system. In this regard, Montana seeks to license a base station with associated mobile units on VPC channel 84 (161.8250/157.2250 MHz) at Jette Mountain and a base station with associated mobile units on VPC channel 25 (161.8500/157.2500 MHz) at the Kalispell Water Tower. Montana states that these channels will be used "in the comprehensive, state-wide Interoperability Montana Radio System."

3. Section 90.20(g)(3)(ii) states that base stations shall not exceed 50 watts output power and mobile units shall not exceed 20 watts output power while operating on the VPC channels. Section

1 See File Nos. 0003330577 and 0003330578 (filed February 19, 2008, amended September 30, 2009).

2 47 C.F.R. § 90.20(g)(3)(ii). We note that at the time Montana filed its waiver, the power limits were codified at 47 C.F.R. § 90.20(g)(5)(ii). However, a subsequent amendment of this section relocated the relevant power limits to 47 C.F.R. § 90.20(g)(3)(ii). See In the Matter of Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, WT Docket No. 04-344, Second Report and Order, 23 FCC Rcd 13711 (2008), recon. pending (AIS Second Report and Order). For purposes of this Order, we will refer to Section 90.20(g)(3)(ii) when discussing the power limits for mobile operations.

3 See associated waiver requests and exhibits attached to ULS applications 0003330577 and 0003330578 (unless otherwise specified herein, we refer to these waiver requests in toto, as "Waiver Request"). For the sake of clarity, we include a list of the attachments to these applications in an appendix to this order.

4 See File No. 0003330577.

5 See File No. 0003330578.

6 Supplemental Waiver of HAAT Limits at 1.

7 See 47 C.F.R. § 90.20(g)(3)(ii).

90.20(g)(3)(ii) also limits the antenna height of base stations operating on the VPC channels to an antenna height above average terrain (HAAT) of 122 meters.⁸

4. Montana seeks to operate the mobile units associated with its proposed base stations at an output power of 40 watts.⁹ Consequently, Montana requires a waiver of the power limits of Section 90.20(g)(3)(ii) in order to exceed the 20 watt limit specified by this rule for mobile units operating on the VPC channels.¹⁰ Montana states that a waiver of the power limits is necessary in order to allow the mobile units operating on the VPC channels to be compatible with the mobile units operating on other channels in the Montana state-wide system.¹¹

5. Montana also seeks to operate its base station at Jette Mountain with an output power of 68 watts and an antenna height above average terrain (HAAT) of 579.5 meters. Consequently, Montana requires a waiver of the power and antenna height limits of Section 90.20(g)(3)(ii) in order to exceed the 50 watt limit and 122 meters HAAT limit specified by this rule for base stations operating on the VPC channels.¹² Montana states that a waiver of the power and antenna height limits is needed because Jette Mountain is an established public safety communications site that is already part of the Interoperability Montana system.¹³ Montana notes that the use of the VPC channel at the Jette Mountain site “would be in concert with the current use of other VHF spectrum on the regional trunked system.”¹⁴

6. Furthermore, Montana states that “[g]ranting this waiver is crucial to the continued operation and development of this radio system designed for the exclusive use of Montana Public Safety Responders” and that “[t]he creation of this system will enhance the safety of local, tribal, state and federal responders, and create effective and efficient tools for communicating critical information.”¹⁵ Montana obtained frequency coordination for the applications and provides contour plots purporting to demonstrate interference protection to co-channel users in adjacent regions despite the proposed overpowered operation.¹⁶

III. DISCUSSION

7. To obtain a waiver of the Commission’s rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;¹⁷ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹⁸ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and

⁸ *Id.*

⁹ See File Nos. 0003330577 and 0003330578. See Waiver of Mobile Power Limits.

¹⁰ 47 C.F.R. § 90.20(g)(3)(ii).

¹¹ See Waiver of Mobile Power Limits.

¹² See 47 C.F.R. § 90.20(g)(3)(ii).

¹³ See Supplemental Waiver of HAAT Limits at 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Jette Mountain 5 dBu Contour Plot and Kalispell Water Tower 5 dBu Contour Plot.

¹⁷ 47 C.F.R. § 1.925(b)(3)(i).

¹⁸ 47 C.F.R. § 1.925(b)(3)(ii).

circumstances that warrant a waiver.¹⁹ Based on the information before us, we conclude that a grant of the Waiver Request is warranted.

8. As an initial matter, we note that Channel 25 consists of VPC frequencies 157.250 and 161.850 MHz, designated under Part 90 for public safety use in inland VHF public coast service areas (VPCSA), including the VPCSA designated for Montana.²⁰ Channel 84, which consists of frequency pair 157.225 and 161.825 MHz, was similarly designated under Part 90 but, in 2008, the Commission redesignated the channel for VPC communications in the inland VPCSA under Part 80.²¹ However, the Commission accorded grandfathering protection to licenses granted pursuant to applications filed prior to the release date of the *AIS Second Report and Order*.²² Because Montana's application was pending as of the *AIS Second Report and Order* release date, it is eligible for this grandfathering provision, and therefore we evaluate Montana's request for Channel 84 as well as Channel 25 under the Part 90 rules.

9. We find that Montana's request for waiver of Section 90.20(g)(3)(ii) is warranted because application of this rule in the present case would not serve the underlying purpose of the rule; that is, to ensure efficient spectrum use by licensees and to prevent interference.²³ Based on our own analysis, we are persuaded that Montana's proposed operation of a base station at greater than 50 watts with an antenna height greater than 122 meters and mobile units at greater than 20 watts will likely create no risk of harmful interference to incumbent operators on these frequencies. In this regard, our analysis indicates that no site-based public coast²⁴ or public safety incumbents²⁵ operate on the requested VPC channels in the State of Montana.

10. Under Section 90.20(g)(3)(iii)(D), public safety licensees operating on VPC channels also are required to design their facilities such that the signal strength from such facilities is less than 5 dB μ V/m at the boundary of an EA where the VPC channels are designated for a non-public safety use.²⁶ Here, the requested VPC channels are allocated for non-public safety use in Idaho where Motorola is the EA licensee on both VPC Channels 25 and 84.²⁷ Our analysis reveals that the 5 dB μ V/m F(50,10) signal strength contour from Montana's base station at Jette Mountain (on VPC Channel 84) and mobile units

¹⁹ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad. Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

²⁰ See 47 C.F.R. § 90.20(g)(2).

²¹ See In the Matter of Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, WT Docket No. 04-344, *Second Report and Order*, 23 FCC Rcd 13711, 13724-25 ¶ 20 & n.91 (2008), *recon. pending* (*AIS Second Report and Order*).

²² See *id.* See 47 C.F.R. § 90.20(g)(2)(ii) (authorizing public safety operations "licensed pursuant to an application filed prior to September 19, 2008" until March 2, 2024). Section 90.20(g), as amended by the *AIS Second Report and Order*, became effective March 1, 2009, thirty days after publication in the Federal Register, January 29, 2009.

²³ See Federal Communications Commission 2006 Biennial Regulatory Review, WT Docket No. 06-156, Wireless Telecommunications Bureau, Staff Report, 22 FCC Rcd 3006, 3091 (WTB 2007).

²⁴ See 47 C.F.R. § 90.20(g)(3)(iii)(A) (requiring frequency protection for coast stations licensed prior to July 6, 1998, by specified separations).

²⁵ See 47 C.F.R. § 90.20(g)(3)(iii)(C) (requiring frequency protection for public safety stations granted pursuant to Section 90.20(g), 47 C.F.R. § 90.20(g)).

²⁶ 47 C.F.R. § Section 90.20(g)(3)(iii)(D) (stating that "[w]here the public safety designated channel is not a public safety designated channel in an adjacent EA: Applicants shall engineer base stations such that the maximum signal strength at the boundary of the adjacent EA does not exceed 5 dB μ V/m"). *Id.*

²⁷ See license WQHE708.

(on VPC Channels 25 and 84) at the proposed power levels would overlap territory in Idaho.²⁸ Notwithstanding the proposed power and antenna height, however, we note that Montana has obtained a letter of concurrence from Motorola (Motorola LOC).²⁹

11. In its concurrence letter, Motorola states that it and Montana “agree to use their best efforts to coordinate their activities and use good engineering practices to avoid any harmful interference that may arise from their use of the channels as described herein.”³⁰ Motorola further states that “[s]uch coordination shall include, without limitation, immediately notifying the other party of any harmful interference and initiating mutually acceptable solutions to resolve any interference issues” and that “[i]f the parties are unable to agree to a mutually acceptable solution within 10 business days of such notification, the interfering party agrees to cease operations on the interfering channel until such time as the parties eliminate the harmful interference.”³¹ Consequently, on our own motion, we waive the signal strength requirement of subsection (iii)(D) in regard to Montana’s operations near Idaho because of the agreement reached by Montana with Motorola.

12. In addition to finding that the relevant rule would not be undermined by a grant of the waiver request, our analysis under the first prong of the Section 1.925 waiver standard requires a finding that grant of the waiver would be in the public interest.³² Based upon the record, we find Montana has demonstrated that grant of a waiver would be in the public interest. In this connection, we agree with Montana that grant of the waiver – conditioned on Montana’s commitment to resolve any harmful interference caused to incumbents as a result of its operation on these frequencies – will enable it “to establish a connected, trunked VHF public safety radio system, for reliable use and interoperability throughout Montana,”³³ consistent with the public interest.

IV. CONCLUSION

13. Based on the record before us, we conclude that Montana’s waiver request satisfies the criteria set forth under Section 1.925 of the Commission’s rules to warrant waiver of Section 90.20(g)(3)(ii) and 90.20(g)(3)(iii)(D). Grant of the request is subject to the condition that Montana must take immediate steps to mitigate, address, and otherwise resolve any harmful interference caused as a result of Montana’s operation in excess of the power limits of Section 90.20(g)(3)(iii) and signal strength limit of Section 90.20(g)(3)(iii)(D) on the channels authorized by this Order.

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission’s rules, 47 C.F.R. § 1.925, that the waiver requests associated with Application File Nos. 0003330577, 0003330578 filed by the State of Montana ARE GRANTED, as conditioned herein.

15. IT IS FURTHER ORDERED that Application File Nos. 0003330577, 0003330578 SHALL BE PROCESSED consistent with this Order and the Commission’s rules.

16. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission’s rules, 47 C.F.R. §§ 0.191, 0.392.

²⁸ See Jette Mountain 5 dBu Contour Plot and Kalispell Water Tower 5 dBu Contour Plot.

²⁹ See license WQHE708 and Motorola LOC. Montana also modified its applications according to the conditions outlined on the Letter of Concurrence from the Motorola LOC. See also Letter of Agreement.

³⁰ Motorola LOC at 3.

³¹ *Id.*

³² See 47 C.F.R. § 1.925(b)(3)(i).

³³ Supplemental Waiver of HAAT Limits at 1.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy Division
Public Safety and Homeland Security Bureau

Appendix

Application File No. 0003330577

<u>Attachment</u>	<u>Date Entered</u>	<u>Short-hand Description</u>
Waiver of Output Power Restrictions	2/19/2008	Waiver of Mobile Power Limits
Contour of support waivers	2/19/2008	19 dBu Contour Plot
Waiver of AAT Restrictions	2/19/2008	Waiver of HAAT Limits
Engineering – Blacktail 25 and 40km 5dBu interference	10/29/2008	Jette Mountain 5 dBu Contour Plot
Montana LOC	10/01/2009	Motorola LOC
AAT Waiver	8/19/2009	Supplemental Waiver of HAAT Limits
Letter Agreeing to LOC Requirements	9/30/2009	Letter of Agreement

Application File No. 0003330578

<u>Attachment</u>	<u>Date Entered</u>	<u>Short-hand Description</u>
Waiver for 20 watt Mobile Restriction	2/19/2008	Waiver of Mobile Power Limits
Request to use VPC PS Frequencies	2/19/2008	Kalispell Water Tower Statement
Engineering – Kalispell Mobile 30 and 45 km west 5 dBu	10/29/2008	Kalispell Water Tower 5 dBu Contour Plot
AAT Waiver	8/18/2009	Supplemental Waiver of HAAT Limits
Montana LOC	10/01/2009	Motorola LOC
Letter Agreeing to LOC Requirements	9/30/2009	Letter of Agreement